IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re: SUBPOENA FOR INSPECTION AND SAMPLING OF PREMISES OWNED BY NON-PARTIES IN THE MATTER OF:	
STATE OF OKLAHOMA, et al. **Plaintiffs**	
vs.	**Case No. 4:05-CV-00329-TCK-SAJ**
TYSON FOODS, INC., et al., **Defendants.**	

POULTRY GROWERS' REPLY TO STATE'S RESPONSE IN OPPOSITION TO POULTRY GROWERS' OBJECTIONS AND MOTION TO QUASH SUBPOENAS FOR INSPECTION AND SAMPLING OF PREMISES OWNED BY NON-PARTIES, OR ALTERNATIVELY, MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT

I. INTRODUCTION

The Plaintiff in its Response to these Poultry Growers'[1] Motion to Quash fails to grasp, misunderstands or simply ignores these Growers' legitimate concerns with the Plaintiff's cryptic Subpoenas. The Plaintiff certainly has not resolved those concerns, and therefore this Court should quash those Subpoenas.

[1] These non-parties are: Bill R. Anderson; Steve Butler, allegedly d/b/a Green Country Farms; Ren Butler and Georgia Butler; Julie Anderson Chancellor; Roger D. Collins; Franklin A. Glenn and Kenneth D. Glenn and Sondra D. Glenn; Juana Loftin; Larry McGarrah and Priscilla McGarrah; Jim L. Pigeon and Michele R. Pigeon; Joel J. Reed and Rhonda Reed and Caleb Reed and Cory Reed; W. A. Saunders and Bev Saunders; Robert V. Schwabe, II; and David R. Wofford and Robin L. Wofford.

II. ARGUMENT

A. The Subpoenas Are Not Reasonably Calculated To Lead To The Discovery Of Admissible Evidence

The Plaintiff blithely states at page 4 of its Response that "[n]owhere in their Objections do the Poultry Growers claim that the State does not need the information to be obtained pursuant to the subpoenas or that such information is irrelevant to the case." The Poultry Growers recognize that this Court appears to have made an initial determination that sampling of their properties is relevant to Plaintiff's case. However, the Poultry Growers respectfully ask that this Court revisit this determination and not prejudge based upon assumptions.

Specifically, the Poultry Growers ask the Court to read Bert Smith's Affidavit, which was attached as Exhibit II to the Motion to Quash. Plaintiff has not performed or provided to the Court the minimal information necessary to make a causal connection between pollution alleged to exist in the Illinois River and the specific properties targeted for invasive discovery. In the absence of a causal connection, these Poultry Growers are saying that the sampling proposed by Plaintiff is a pseudo-science project that is not reasonably calculated to lead to admissible evidence, and therefore the Subpoenas should be quashed.

In its Response, the Plaintiff makes numerous recitations that it "needs" the evidence from the Poultry Growers' farms and that such evidence is "relevant." What the Plaintiff is really saying, however, is that the Court should **assume** that conclusion. That is, the Plaintiff proclaims that it needs to conduct the sampling because such sampling will lead to relevant evidence that will prove its case. Yet it does so without first explaining to the Court, either in the Subpoenas or in its Response, the causal link between the condition of the Illinois River and litter applications by these Poultry Growers. In other words, relevance is not demonstrated. Further, Plaintiff fails to explain what criteria, methods and processes it proposes to utilize in

obtaining the evidence. As the Affidavit of Bert Smith, attached as Exhibit II to these Growers' Motion to Quash states, the Plaintiff cannot possibly know what it needs or whether the sampling will yield relevant, admissible evidence without first laying a sufficient predicate explaining its sampling methods, criteria and processes.

The Plaintiff appears to be really asking that the Poultry Growers indulge it to their deteriment as it engages in a fishing expedition that may or may not yield the data it claims it so desperately needs from the Poultry Growers' properties. Indeed, the Plaintiff is asking that the Poultry Growers participate as unwilling guinea pigs in the Plaintiff's misguided science project. See, e.g., Koch v. Koch Indus., Inc., 203 F.3d 1202, 1238 (10th Cir. 2000) ("Plaintiff's mere hope that they might find something on which to base a claim ... [constituted] a 'fishing expedition,'" which the trial court had the inherent power to deny); Belcher v. Bassett Furniture Industries, Inc., 588 F.2d 904, 908 (4th Cir. 1978) ("[S]ince entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity of the inspection would seem warranted").

Courts routinely consider whether a subpoena constitutes an "undue burden" based on the relevance of the material sought. Compaq Computer Corp. v Packard Bell Elecs., 163 F.R.D. 329, 335-36 (N.D. Cal. 1995); N.Y. State Energy Research v. Nuclear Fuel Servs., 97 F.R.D. 709, 712 (W.D.N.Y. 1983). Moreover, "[i]f the sought-after documents are not relevant nor calculated to lead to the discovery of admissible evidence, then any burden whatsoever imposed upon [the subpoenaed party] would be by definition 'undue.'" Compaq Computer, 163 F.R.D. at 335-36.

A "subpoena that 'pursues material with little apparent or likely relevance to the subject matter'" is likely to be quashed. Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 50

(S.D.N.Y. 1996) ("[t]o the extent a subpoena sweepingly pursues material with little apparent or likely relevance to the subject matter it runs the greater risk of being found overbroad and unreasonable."). **Demonstrating relevance is the burden of the party seeking discovery.** Compaq Computer Corp., 163 F.R.D. at 335; Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Serv., 211 F.R.D. 658, 663 (D. Kan. 2003).

Rather than address the issues that Mr. Smith raises in his Affidavit, the Plaintiff responds with the shallow assertion that "[a]dmissibility is not the standard in discovery." See Response at p. 16. The Plaintiff is mistaken. In fact, it is the Plaintiff which has the burden of showing that the data it "needs" is both relevant and calculated to lead to the discovery of admissible evidence. The Plaintiff cannot meet this burden absent (a) demonstrating a causal link; and (b) at least a baseline showing of how the processes, methods and criteria utilized in the sampling events will actually yield the data it seeks. Mr. Smith's Affidavit leaves no doubt that, as currently proposed, the Subpoenas not only fail to make this baseline showing, but they will only lead to unreliable, irrelevant evidence that cannot be used to support the Plaintiff's claims. The Plaintiff offers nothing to suggest otherwise.

Based on the foregoing, the Poultry Growers respectfully request that the Court quash the Subpoenas. In the alternative, the Poultry Growers request that the Court order Plaintiff to produce such evidence for the Court's *in camera* inspection. Should the Court elect to pursue this avenue, these Growers respectfully suggest that the Court appoint an environmental expert to assist the Court in such an evaluation.

B. The Subpoenas Fail To Specify Reasonable Time, Place And Manner Restrictions And Thus, Are Overly Broad And Unduly Burdensome On Their Face

The Subpoenas propose four (4) different sampling events: (1) Waste Samples from Production Facilities (Poultry Houses); (2) Soil Samples from Waste Applied Fields; (3) Rainfall Runoff Samples; and (4) Groundwater Samples.

As noted in our Motion to Quash, the Subpoenas must be quashed pursuant to Federal Rule 45(c)(3)(A) because they are facially overbroad and therefore unduly burdensome. The Subpoenas fail to specify a reasonable **time, place and manner** for the proposed sampling events as required by Federal Rules 45 and 34(b). The Subpoenas fail to specify **where** the inspections and sampling will occur, **how often** the sampling events will occur, or **what time** of the day or night they will occur. The Subpoenas also fail to specify the **duration** of the sampling (except for the Rainfall Runoff Samples which are slated to conclude on June 30, 2006), or whether the Poultry Growers will receive compensation for any damage that occurs to their property or business.[2]

The Plaintiff's Response chooses not to confront the reality that Federal Rules 45 and 34(b) impose reasonable time, place and manner restrictions on the Subpoenas. Nor does the Plaintiff even remotely attempt to explain to the Court how, despite the facial deficiencies present in the Subpoenas, they actually meet these requirements. Instead, the Plaintiff intertwines the concept of "relevance" with "reasonable time, place and manner." According to

[2] In the case of Williams v. Continental Oil Co., 14 F.R.D. 58 (W.D. Okla. 1953), the court stated that "the cases uniformly agree that where a survey is ordered the complete risk and hazard, if any, must be borne by the plaintiff; the defendant cannot be submitted to possible loss." The Subpoenas say nothing about who shall bear the possible loss that the Poultry Growers may suffer. Federal Rule 45(c)(2)(B) requires that as a condition precedent to successfully obtaining an order permitting inspection, the subpoenaing party must pay any "significant" expense incurred by the complying party. As the Advisory Committee noted: "[a] non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court." See § 45 App. 08[2] (Committee Note of 1991 to Amendment--Rule 45(c)(2)); see also In re Letters Rogatory Issued by Nat'l Court of First Instance in Commercial Matters, 144 F.R.D. 272, 278 (E.D. Pa. 1992) (stating that the premise behind Rule 45(c)(2)(B) expense shifting is that "[n]on-party witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party.").

the Plaintiff, the Subpoenas are not overly broad because they "have as their result material and information that obviously has great relevance to the subject matter of the suit." See Response at p. 4. This response misses the mark. As explained earlier, a Rule 45 subpoena must seek relevant information. But it must also contain reasonable time, place and manner restrictions, which these Subpoenas fail to do.

It is telling that the Plaintiff cannot cite one case – either State or Federal – that has ever subjected non-parties to invasive soil, rainfall runoff or groundwater sampling under the circumstances present here. He cannot do so because none exist.[3] Plaintiff relies on the case of Thomas v. FAG Bearings Corp., 846 F. Supp. 1382 (W.D. Mo. 1984), citing this case for the proposition that "a court dealing with the issue of a subpoena issued to property owners for environmental testing on their land refused to quash the inspections." See Response at p. 6. However, this case lends no support to the Plaintiff because (1) the subpoenas were **issued to third party defendants** who then became non-parties after they had obtained summary judgment against the third party plaintiff on issues of causation; and (2) the case makes no reference to the scope of the testing at issue, because **the non-parties did not contest the subpoenas on the basis that they failed to specify reasonable time, place and manner restrictions**.

On May, 2, 2006, one day after the Poultry Growers filed their Motion, the Plaintiff's counsel sent a letter to persons affected by the Subpoenas addressing some of the time, place and manner deficiencies in the Subpoenas. With respect to the Poultry House sampling, the Plaintiff

[3] The best that the Plaintiff can do to is to attempt to distinguish the cases cited by these Growers. This is unconvincing. The cases cited by the Poultry Growers in their motion all uniformly stand for the basic proposition that a Rule 45 subpoena must comply with Rule 34(b) by specifying reasonable time, place and manner restrictions. These Subpoenas do not do so, and thus they should be quashed.

has proposed certain biosecurity protocols (this issue is more particularly discussed in Section II F, infra.)

With respect to the Soil Samples from Waste Applied Fields, the Plaintiff has also proposed some modifications that ease the Poultry Growers' concern with the **manner** of testing. These modifications are set forth in the "Illinois River Watershed Soil and Litter/Manure and Sampling Protocol" (the "Protocol") attached as Exhibit A. However, that Protocol does not address the **time** and **place** for the testing.

With respect to the Rainfall Runoff Samples and Groundwater Samples, the Plaintiff has offered **nothing** to address the time and place deficiencies inherent in these sampling events.

Because of these continuing deficiencies, the Court should quash the Subpoenas as required by Federal Rule 45(c)(3)(A). It is contrary to law, if not manifestly unfair, to require these non-party Poultry Growers to be at the mercy of such vague and unclear requests that give little, if any guidance on what the Plaintiff really wants. E.g., Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998) ("concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs."); Goodyear Tire & Rubber Co., 211 F.R.D. at 662 ("[t]he status of a person as a non-party is a factor that weighs against disclosure.").

C. The Plaintiff's Soil Sampling Protocol Leaves No Doubt That Compliance Implicates The Growers Fifth Amendment Privilege Against Self-Incrimination

The Poultry Growers asserted an objection to the Subpoenas to the extent they implicated their Fifth Amendment privilege against self-incrimination. At the time the Poultry Growers filed the Motion, they were told by counsel for the Plaintiff that no informal inquiry would be made by the Plaintiff of any Poultry Grower. The Poultry Growers reserved the right to revisit their Fifth Amendment privilege if it became clear that the sampling required the Plaintiff to

make inquiries of the Poultry Growers. The Poultry Growers concern was that such inquiries would require them to provide (1) compelled (2) testimony (3) that incriminated them.

The Protocol provided to the Poultry Growers after they filed their Motion leaves no doubt that the Poultry Growers now have a valid Fifth Amendment objection. The Protocol specifies that for each Farm/Facility sampled, the testers will compile certain information in a Sampling Log Book. Included are the following items, which can only be obtained through interrogating a Grower:

1. "Confirm" the amounts, rates and dates of prior litter/manure applications to specific litter application locations ("LAL") on the property;
2. The water supply for the property;
3. Whether the litter has been treated, and if so, the type of treatment, its amount, rate of application and date;
4. Information as to any other fertilizers, chemicals or soil amendments added during the last five years;
5. Use of each LAL by cattle (yes or no) and typical number of cattle;
6. Type of vegetation currently on the LAL, if any, and any known vegetation grown in the past 5 years; and
7. Use of adjacent fields.

See Exhibit A, § II.A.7.

The privilege against self-incrimination protects a person against being incriminated by his own compelled testimonial communications. E.g., Doe v. United States, 487 U.S. 201, 207, 108 S. Ct. 2341 (1988). In order to be "testimonial," the communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Id. at 209-210; see also United States v. Hubbel, 530 U.S. 27, 34 (2000) ("The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character.").

Thus, in performing the testing under the Protocol, it is clear that the Plaintiff must obtain testimonial communications from the Poultry Growers. The Poultry Growers are compelled to do so under threat of contempt. E.g., Fisher v. United States, 425 U.S. 391, 409 (1976) (stating that the enforcement authority that rests behind the issuance of any subpoena provides the requisite compulsion). The information the Poultry Growers will be forced to provide the Plaintiff explicitly consists of factual assertions and disclosures of information regarding the source of incriminating evidence. The Protocol and thus, the Subpoenas, present a grave Fifth Amendment concern for the Poultry Growers. As explained in the Motion, the Plaintiff has made it clear that it believes that any constituent of poultry litter that reaches waters of the State of Oklahoma presents a violation of Oklahoma law, including criminal law.

The Plaintiff attempts to diffuse this concern by lamenting that "the Plaintiff's demand upon the Poultry Growers is not a testimonial demand." See Response at p. 15. The Plaintiff is obviously wrong since, as just explained, to complete their log, the Plaintiff's testers must communicate directly with the Poultry Growers.

The Poultry Growers' position finds additional support in the case of Pennsylvania v. Muniz, 496 U.S. 582 (1990). In Muniz, the Court found a Fifth Amendment violation when the police compelled a DUI suspect to answer the date of his sixth birthday. The Court rejected the government's argument that requiring the DUI defendant to answer the date of his sixth birthday only comprised the defendant's physiological state of mind – or a physical characteristic – as opposed to a testimonial communication. Rather, the Court found a testimonial communication because the question forced the defendant to confront the "cruel trilemma of self-accusation, perjury or contempt," which is the rationale underlying the privilege against self-incrimination. Id. at 598-99; see also Murphy v. Waterfront Cmm'n, 378 U.S. 52, 55 (1964). Thus in Muniz,

the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent. The defendant was left with the choice of incriminating himself by admitting that he did not know the date of his sixth birthday (which was incriminating), or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). Id. at 599.

Applying the principles of the Muniz case to the facts present here shows that the act of complying with the Subpoenas also constitutes the type of communication that the Court has found repulsive under the Fifth Amendment. Although the Poultry Growers are not being asked directly if they contaminated the land and violated Oklahoma law in doing so, they are implicitly providing this information in being asked to direct the Plaintiff to where newly-applied chicken litter has been spread. Such request communicates the source of where evidence of a crime exists. Plaintiff cannot get this information from any other source than from the Growers' communications. Moreover, the Poultry Growers will undoubtedly face the "cruel trilemma" shunned by the Court if forced to reveal where the chicken litter is spread. If the Poultry Growers remain silent, they may be in contempt of the Subpoenas they have been compelled to comply with. If they answer truthfully, they are communicating self-incriminating information as discussed above. If they answer untruthfully, they also incriminate themselves by creating an inference of guilt.

Additional case law support is found in the case of United States v. Green, 272 F.2d 758 (5th Cir. 2001). While in custody, the defendant responded to Miranda warnings with unambiguous requests for his lawyer. Despite this, investigators asked the defendant to open the combination lock of a gun safe and locate other stored guns in his home. The government argued that the defendant's acts of opening the safe and locating the guns were non-testimonial

in nature. The Green court rejected this argument and found that the defendant's compliance was testimonial evidence obtained in violation of his Fifth Amendment right to counsel. In doing so, the court relied on the Supreme Court's pronouncement as to what constitutes testimonial communications. "There is no serious question but that Green's actions in disclosing the locations and opening the combination locks of the cases containing firearms were testimonial and communicative in nature. These compelled acts disclosed Green's knowledge of the presence of firearms in these cases and of the means of opening these cases." Id. at 753 (citing Doe v. United States and Pennsylvania v. Muniz, supra).

Similarly, requiring the Poultry Growers to identify areas of newly-applied litter and the other information contained in the Protocol requires them to communicate their knowledge of the source of potentially incriminating evidence. Providing this information is testimonial in nature just as was the defendant in Green disclosing the locations of his gun safe and opening the locks. For this reason, the Subpoenas, or at least the portion relating to the Soil Samples from Waste Applied Fields, must be quashed as violative of the Poultry Growers' Fifth Amendment privilege against self-incrimination.[4]

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[4] The Subpoenas present another serious concern to the Poultry Growers in addition to the Fifth Amendment concern. On its face, the Protocol requires the Plaintiff's testers to interrogate the Poultry Growers on a number of topics including the source of the chicken litter, information on chemicals and fertilizers spread on the land, type of vegetation on the land, etcetera. This is tantamount to conducting roving depositions under the guise of a Rule 45 subpoena.

The case of Belcher v. Bassett Furniture Industries, Inc., supra, addressed the same concern. There, the Fourth Circuit reversed a district court order granting plaintiffs' motion for Rule 34 discovery in the form of a plant inspection, which permitted the plaintiff's testers to interrogate the defendant's employees during the inspection. Defendants argued, and the court agreed, that "interrogation of the employees, conducted informally, would also be ... tantamount to a roving deposition, taken without notice, throughout the plants, of persons who were not sworn and whose testimony was not recorded, and without any right of the defendant to make any objection to the questions asked." 588 F.2d at 908.

In this case, the Plaintiff proposes asking the Poultry Growers detailed information during the inspection of their property without the protection of a sworn record and the presence of counsel. Indeed, the latter point is especially concerning considering the Fifth Amendment issues discussed earlier. If this information is really needed for the Plaintiff to conduct his sampling, then the proper method to obtain it is through a sworn deposition with a stenographer and counsel present.

D. The State's Actions Constitute a Taking

Both Oklahoma Secretary of the Environment and Oklahoma Attorney General are required as a pre-condition of service to take the following oath: "... do solemnly swear that I will support, obey and defend the Constitution of the United States, and the Constitution of the State of Oklahoma, ..." (See Oklahoma Constitution Art. 15, §1) In their Motion to Quash, the Poultry Growers simply ask that the Constitutions be followed and that private property not be taken without just compensation. Poultry Growers have asserted that the State's proposed activities constitute a taking without just compensation contrary to both the Oklahoma Constitution and the Fifth Amendment to the United States Constitution. In an effort to avoid these constitutional constraints, the State first argues that it should be treated like any private litigant and not as the State exercising sovereign power. However, a review of the State's Response reveals numerous assertions by the State that its proposed sampling is needed for the good of the State of Oklahoma and its citizens. The State cannot have it both ways. It cannot purport to exercise its authority as a sovereign and at the same time contend it is merely like any other litigant. Ultimately, the State is the State, not just another private litigant, and therefore must conduct itself in accordance with the United States and Oklahoma Constitutions.

The State ignores, and does not address, the Oklahoma Constitution's requirement that a taking can only be accomplished with just compensation. Concerning the Fifth Amendment, the State only cites one case for its assertion that its actions do not constitute a taking under federal law. However, that case, Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002), actually supports the Poultry Growers' position.

At issue in Boise was whether a preliminary injunction allowing the government entry onto a 65-acre forested property for a five-month period for the purpose of surveying spotted owls constituted a *per se* taking under the United States Supreme Court's ruling in Loretto v.

Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982). The court in Boise determined that the owl surveys were limited, transient and nonexclusive entries on the property by the government. 296 F.3d at 1357. This, coupled with the fact that the purpose of the survey was to discover information necessary in a case **that the landowner initiated**, led the court to conclude there was no *per se* taking. Id. It is this portion of the opinion, as to owl surveys, that the State cites and relies on in its Response.

What the State fails to mention in its Response is that the Boise opinion goes on to emphasize that **groundwater monitoring wells constitute a *per se* taking**. The Boise court distinguished a case the landowner had cited, Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991). At issue in Hendler was the government's installation of concrete wells to monitor groundwater pollution from a nearby superfund cite. 296 F.3d at 1355. In Hendler, the Federal Circuit held that "the wells, and the government workers who entered to install, maintain, and monitor them permanently occupied the plaintiffs' land and therefore gave rise to a *per se* taking under Loretto." Id. The Boise court rejected that owl surveys amounted to the type of intrusion manifested by monitoring wells and reaffirmed that monitoring wells can constitute a *per se* taking. Id. at 1357.

In this case, the State seeks to engage in far more than bird watching. The Subpoenas provide that "at selected locations (up to three per field) a plastic pipe will be installed to allow repeated sampling of the groundwater" and "a small concrete pad will be placed around and over the pipe." An "auger drilling rig may be used." The State seeks to send crews on to the Poultry Growers' property to drill and install concrete wells and to go onto the property over an indefinite period of time to maintain and monitor those wells. That is precisely the type of activity that the Boise court found was a taking under federal law. Further, the State proposes

extraordinary taking of soil samples in large numbers and volumes, which also is a taking of property.

The State also argues that any claim for a taking is not yet ripe and, in any event, all that is required is that an adequate provision for obtaining compensation exist, citing Williamson County Regional Planning Commission v. Hamilton Bank of Johnson, 473 U.S. 172, 105 S. Ct. 3108 (1985). Williamson dealt with the issue of when zoning laws and regulations constitute a taking, an issue wholly unrelated to this matter. Moreover, the State ignores the facts. This matter is ripe. The State was prepared to enter the Poultry Growers' property on May 5 pursuant to the Subpoenas and commence the taking. But for the Poultry Growers' Objections, the taking would have occurred. Furthermore, there is no mechanism other than eminent domain proceedings in place for compensation of the landowners. The State has made it abundantly clear that it does not intend to provide compensation for the taking and has not initiated any of the eminent domain procedures available under state law to determine just compensation.

The State's Response asserts that its activities will do "no damage" and impose only "truly minimum burdens." How the State can contend that bringing vehicles and drilling equipment on to areas of property without road access, digging and hauling away soil, drilling wells and installing concrete pads, and having men and vehicles continually maintaining and monitoring the wells will not result in any damage or imposition defies credibility. After all, hay and pasturing areas are susceptible to injury by merely entering onto them, thereby reducing production. These hay and pasturing areas are an integral part of the farming operation of the Poultry Growers.

Accordingly, should this Court determine that Plaintiff can enter these Poultry Growers' lands, and take soil samples and/or install monitoring wells, the Court should stay

implementation of these acts until such time as Plaintiff has fully complied with the condemnation procedures mandated by Oklahoma law. See, 66 O.S. § 53 et seq.

E. It Is Illegal For The State To Install Its Monitoring Wells As Proposed

In its Response, Plaintiff does not address the actual issue. The Plaintiff focuses on the fact it intends to use a geoprobe to reach the groundwater, and states that it will (without supplying any specifics) properly abandon those borings. However, in its Subpoenas, Plaintiff states that: "At selected locations (up to three per field), a plastic pipe will be placed in the probe hole to allow repeated sampling of the groundwater."

Once casing (here, "a plastic pipe") is inserted into a groundwater well, it becomes a "monitoring" well.[5] There are minimum construction standards for monitoring wells, which the Plaintiff's proposed methodology clearly **do not meet**. See Exhibit B. For instance, the wells as proposed by Plaintiff do not meet the requirements for diameter size and size of the casing, they will not be screened, and they will not be sealed. These monitoring well construction standards are important, because they ensure that cross-contamination of groundwater can't occur. In other words, allowing the Plaintiff to install wells the way it proposes may end up **causing** the very contamination the Plaintiff is looking for. It would be an illegal act for the Plaintiff to install the wells as proposed.[6]

We also note that the well-plugging regulation cited by Plaintiff is not applicable to monitoring wells, and accordingly is inapposite. However, it is interesting to note that the regulation requires direct push geotechnical borings to be plugged and abandoned within 30 days. 785 O.A.C. § 35-11-2(c). The Subpoenas on their face are not so limited, stating only that

[5] See Oklahoma Administrative Code Sec. 785:35-7-2, attached hereto as Exhibit B. The Affidavit of Kent Wilkins offered by the Plaintiff does not mention this fact.
[6] Plaintiff could request a variance from the Oklahoma Water Resources Board (see 785 O.A.C. § 35-7-3, attached hereto as Exhibit C) but hasn't done so.

Plaintiff intends "repeated sampling of the groundwater." Hence, on their face the subpoenas authorize another illegal act, because the borings will not be plugged within 30 days.

F. Adequate Biosecurity May Still Be An Issue

It is ironic, to say the least, that Plaintiff chastises these Poultry Growers for failing to divine what Plaintiff really intends to do concerning biosecurity when Plaintiff easily could have attached such information to its cryptic Subpoenas.

In its Response, Plaintiff alludes to some biosecurity protocols proposed by the Oklahoma Department of Agriculture, Food & Forestry ("ODAFF") in connection with a dispute between some of these Poultry Growers and ODAFF. However, since the Plaintiff represented to the court handling that matter that what ODAFF was proposing was not related to this case,[7] it is not surprising that these Poultry Growers did not expect that what the Plaintiff would ultimately propose here is a variant of the ODAFF proposal.

In addition, while biosecurity was discussed between the Plaintiff and the Defendants at the April 25, 2006 meeting of counsel, counsel for these Growers were not provided with a copy of any proposals. Plaintiff did not address any biosecurity questions to these Growers until counsel for these Poultry Growers received a letter from counsel for Plaintiff at 4:30 PM Friday, May 5, 2006.[8] Finally, for the Plaintiff to state, in underlined language in its Response (p.10), that these Poultry Growers did not acknowledge that the State might sample poultry houses after the birds have been removed is just plain wrong. Such was acknowledged in footnote 8 to these Grower's Motion to Quash.

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[7] At the hearing held on January 20, 2006 on ODAFF's Motion to Dismiss Case No. CJ-2005-8975 (District Court of Oklahoma County), the Honorable Barbara G. Swinton, District Judge, asked the Assistant Attorney General "Why not stay these proceedings until the federal lawsuit is determined?" The answer was: "The Department's acts are not related to that litigation. They are merely attempting to perform their administrative responsibilities." Transcript of Proceedings on Motion to Dismiss and Motion to Quash, p. 34, lines 1-5.

[8] A copy of Plaintiff's May 5, 2006 letter to counsel for these Growers, and their May 8, 2006 reply, are attached as Exhibit D.

We also note that Plaintiff, its protestations to the contrary not withstanding, has not **committed** to having sampling performed only when the birds have been removed, or to comply with the legitimate biosecurity protocols of the Defendants[9] (which these Poultry Growers adopt herein by reference).

Without in any way waiving their arguments that no sampling should be allowed on their properties pursuant to these Subpoenas, should this Court rule otherwise: **if** sampling of the poultry houses is performed by the grower alone and after the birds have been removed, **if** this Court orders Plaintiff to comply, as to each property sampled, with the Defendants' biosecurity protocols, and **if** Plaintiff deposits with this Court sufficient moneys to compensate these Growers for any loss incurred due to Plaintiff's activities,[10] then biosecurity would no longer be an issue for these Poultry Growers.[11]

III. CONCLUSION

For the reasons stated above and in their Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties, or Alternatively, Motion for Protective Order, the Poultry Growers request that the Court quash the Subpoenas issued to them or, alternatively, issue a protective order directing that the Plaintiff's proposed discovery activities by stayed until such time as the Plaintiff has demonstrated compliance with all applicable laws, rules and regulations of the State of Oklahoma,[12] and until such time as the Plaintiff has posted bond for

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[9] Those biosecurity protocols are contained in the April 27 and 28 letters attached as Exhibit 2 to the Defendants' Motion for a Protective Order (doc. 540-1), and in the separate protocols of Tyson and Cobb attached as Exhibit 4 to that same document.

[10] Plaintiff completely ignores these Growers' legitimate compensation concerns in its Response.

[11] These Poultry Growers would, however, need a protective order detailing exactly what Plaintiff is authorized to do, and only that.

[12] In addition, should the Court allow Plaintiff ultimately to perform some inspection and sampling acts, these Poultry Growers would need an enforceable protective order to ensure the Plaintiff performs only the specific acts authorized by this Court.

the potential injury that may result to the properties and businesses of these non-parties as a result of the Plaintiff's proposed invasive discovery activities.

Respectfully submitted,

s/ D. Kenyon Williams, Jr.
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ATTORNEYS FOR POULTRY GROWERS

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2006, a copy of the above and foregoing was sent via facsimile to the following counsel of record:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
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